12.

THE BAKER

HABEAS CORPUS CASE.

ARGUMENT

ON THE

JURISDICTION OF PROBATE COURTS.

BY

GEORGE C. BATES, Esq.,

LATE ATTORNEY FOR THE UNITED STATES IN THE TERRITORY OF UTAH.

MR. BATES.

The relator Baker, has been tried, convicted, and sentenced to the penitentiary for robbery, has served part of his time, and now seeks to be discharged on the ground that the probate court of the Territory of Utah has no jurisdiction over crimes committed within the county or Territory, in short that the probate court has no other or further jurisdiction than that of a mere probate court, to wit, in the administration of estates, probate of wills, and guardianship of children, and that under the municipal charter or organic law of Utah, Congress alone can prescribe the criminal jurisdiction of the courts of the Territory; and that by the 9th section of the charter or act of incorporation of Utah, it has limited the jurisdiction of the probate court solely to probate jurisdiction.

And first, it is insisted that under our form of government Congress has no legal power to prescribe the jurisdiction in CRIMINAL CASES for a violation of the *local* laws of a Territory. That is the foundation or keystone on which I build my superstructure. Congress never has had the power, and Congress never attempted until 1862 to interfere in any respect, by legislation, with the criminal jurisdiction of the States or Territories. I wish to emphasize this, because I shall have occasion to refer with the greatest possible respect to your honor's opinion delivered in a recent *habeas corpus* case here. I say nothing about jurisdiction in *chancery* or at *common law;* but I say that Congress has no power whatever, under our form of government, to intermeddle with the prosecution of crimes for offenses against the local laws of a Territory, and never was such a pretence set up until after that unholy, unhappy war in 1862. If this proposition be true, then, your honor, that would end the whole of this discussion. Now, Congress may exercise power, brute power, and there can be no appeal from it; although I think that I could demonstrate, in five minutes, that that bill that was before Congress last winter—the Frelinghuysen bill—was in utter violation of the theory of our government, and that the Supreme Court would have put its heel upon it the very moment it got there. It was directly in the teeth and eyes of the decision given in the Engelbrecht case, which I have before referred to, and which I shall cite. Congress may exercise the power to say "yea" and "nay," and may do many things

from which there is no redress, but which are unlawful. For instance, the vote at the close of the last Congress by which they took fifteen hundred thousand dollars from the Treasury was an infamous wrong to the government, which the people can only redress at the ballot box.

Now, your honor, I say that when the municipal charter of this Territory, that is, the organic law, was granted, the powers of the people and of the local legislature under that charter were precisely the same as they are in a State; and that when I came here, when your honor came here, when these hundred and twenty thousand people came here—I do not care where they came from, nor what is their religion—they did not lose their citizenship or their manhood; and I am going to show your honor that, even previous to the days of 1784, Congress never pretended, until 1862, to exercise the right to intermeddle with the local affairs of a Territory, or with the local jurisdiction in crimes against the local laws of a Territory. The powers of Congress over Territories having sufficient population to maintain a local government, to wit, five thousand people, are confined to simply this, they can grant a municipal government called the organic law.

Now, your honor, I want to go back for a minute. This is a very interesting question. It sprang up in this Territory owing to circumstances to which I will not now allude; but never, sir, from 1784 until 1862 did Congress attempt to interfere with the local laws of a Territory. I read from the ordinance of 1784. I need not tell this court that it was drawn up by one Dane, as was said by the Senator from South Carolina, in the great discussion between himself and Mr. Webster. Now, your honor knows full well that at the time of the organization of the Government the only territory we had outside the limits of the States was territory conveyed by Virginia, North Carolina and Georgia, and it became necessary to frame a form of government for it, and Nathan Dane, one of the most learned, patriotic and best men that ever lived, drew up this ordinance. The spirit of this ordinance, and I may say the letter of this ordinance, your honor, is found right here in the laws of Utah. This very day Nathan Dane's ordinance is re-enacted here by the Legislative Assembly of the Territory of Utah.

I will now read section 5 of the ordinance of 1787:

> The Governor and Judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to Congress from time to time; which laws shall be in force in the district until the organization of the General Assembly therein, *unless disapproved of by Congress*, but afterwards the Legislature shall have authority to alter them as they think fit.

Now there were three stages of government, your honor. The first one was that simple form wherein, in order to save expense, Congress authorized the governor and judges to become a legislature and to adopt, as they did in Michigan, from other States, certain laws, and they were to remain in full force and effect until the organization of the general Assembly, *unless disapproved by Congress*. I beg your attention to this, because, really, at the bottom of this question, which is being discussed here, which people are so flippant about on the streets, and in regard to which so many newspaper discussions have taken place, every principle, every theory, the very heart of our government is involved.

Now, your honor, that is the theory of territorial government from 1784, re-enacted in 1787, and which constitutes, to-day, the sole principle upon which Congress can interfere, or can direct or legislate at all on the subject of Territorial rights. Such has been the settled law of the United States, and of all departments of the government since 1784, and upon which the government itself was established.

I will now allude for a moment, your honor, to the modern theory, that Territories are the wards of Congress; that the pioneers who settled these magnificent valleys, I speak not alone of those in this valley, but also of those who have

gone clean over to the Pacific Ocean, whose log cabins have been built on Puget Sound, who left their homes in the east as we did ours, and as you have yours in Virginia or Missouri; that these pioneers, the bravest and best men that ever lived, the most enterprising, daring, and honest, unless corrupted by extraneous influences, are the wards of Congress, and that Congress is our guardian. Heaven forbid it! We have lost neither our manhood nor our citizenship by coming here. We all of us stand here before your honor, to-day, clad in the panoply of American citizenship. No member of Congress, be he honest or corrupt; no president, be he good or bad, holds in his hands any one of our rights that are guaranteed under the Constitution of the United States, and when we left our eastern homes we did not surrender any right to self-government.

I read first 19 Howard, page 448, Dred Scott against Sandford:

> But the power of Congress over the person or property of a citizen (in a Territory) can never be a mere discretionary power under our Constitution and form of government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved.

A reference to a few of the provisions of the Constitution will illustrate this proposition.

For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances.

Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation.

The powers over person and property of which we speak are not only *not* granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government might attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.

I know, your honor, that there is an unhappy antipathy amongst lawyers to this decision. So far forth as it attempted to extend the power of slavery beyond Territorial law it was rejected; but so far as it settled the power of Congress over the Territories it was assented to by every single judge on the bench. Let us see who they were: R. B. Taney, J. McLean, Jas. M. Wayne, John Catlon, P. V. Daniel, S. Nelson, R. C. Grier,

B. R. Curtis, J. A. Campbell. We have seen what they say on this subject. I am speaking now, your honor, on the point that Congress has no authority, whatsoever, to interfere with the *criminal jurisdiction* of our local courts, for local offences. So far as offences are committed against the laws of the United States, of course Congress has the power to control them, but so far forth as local laws regulating crimes against a Territorial government is concerned, I repeat that Congress has no more business to pass a law defining what shall be robbery, murder or larceny in this Territory than in the State of Illinois; and whenever it does pass such a law, the Supreme Court of the United States, as soon as the matter is brought before them, will certainly reverse it.

Now, your honor, my proposition on the first point is this—Congress has no more power, under our form of government, to interfere with the *domestic matters of this Territory*, especially those connected with offenses against our local laws, than it has to quarter soldiers in private houses in this Territory, or to deprive our citizens of their rights under the Constitution. A word or two in this connection, upon this Engelbrecht decision. It is the unanimous decision of the tribunal of last resort of our country, I may add the noblest tribunal that administers justice in the world. This opinion was pronounced by a man who has just gone to his long account, and whose whole life was an illustration of truthfulness, honesty, justice and equity. Your honor will find when you come to consider it—I say it with the highest possible respect because I have been studying your honor's opinion in connection with it—that this decision does militate against your honor's, and, your honor will pardon me, when I say that it is utterly impossible for that decision to be law, if the opinion which your honor lately pronounced in a case of *habeas corpus* is law.

Now let us see what Chief Justice Chase says in the Engelbrecht decision:

> The theory upon which the various governments for portions of the Territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress. As early as 1784 an ordinance was adopted by the Congress of the Confederation, providing for the division of all the Territory ceded or to be ceded, into States, with boundaries ascertained by the ordinance. These States were severally authorized to adopt for their temporary government the constitution and laws of any one of the States, and provision was made for their ultimate admission by delegates into the Congress of the United States. We thus find the first plan for the establishment of governments in the Territories, authorized the adoption of State governments from the start, and committed all matters of *internal legislation to the discretion* of the inhabitants, unrestricted otherwise *than by the State Constitution* originally adopted by them.
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> This ordinance, applying to all territories ceded or to be ceded, was superseded three years later by the ordinance of 1787, restricted in its application to the territory northwest of the river Ohio—the only territory which had been actually ceded to the United States.
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> It provided for the appointment of the governor and three judges of the court, who were authorized to adopt, for the temporary government of the district, such laws of the original States as might be adapted to its circumstances. But as soon as the number of adult male inhabitants should amount to five thousand, they were authorized to elect representatives, to a house of representatives, who were required to nominate ten persons from whom Congress should elect seven to constitute a legislative council: and the house and council thus selected and appointed were thenceforth to constitute the legislature of the Territory, which was authorized to elect a delegate to Congress, with the right of debating, but not of voting. This legislature, subject to the negative of the governor and certain fundamental principles and provisions embodied in articles of compact, was clothed with the full power of legislation for the Territory.
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> In all the Territories full power was given to the legislature over all ordinary subjects of legislation. The terms in which it was granted were various, but the import was the same in all.

The doctrine, in the early, palmy days of this government, was, that these people who scattered themselves over the Territories, who encountered the Indians, and who built up towns, cities and villages in the Territories of the United States, and erected railroads and telegraphs, should be a state *ad interim*.

Let me look a moment more to the decision from Michigan. There is no State in this Union whose bench stands higher. In 21 Michi-

gan, page 75, in the case of Crane *vs* Reeder, the Court says:

> Immediately after the Government of the United States was organized under the constitution, a brief statute was passed to adopt the ordinance of the constitution, not to change its nature, but as stated in the preamble, in order that it "may continue to have full effect." And so long as the system should continue, the whole local regulation was clearly delegated to the Territory, as it was afterwards to Michigan when separately organized.
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> Then, under the old common law notions, the creation of such a government would be at least an equivalent to the erection of a county palatine, and would transfer all necessary sovereign prerogatives. But under this ordinance the Territory not only differed from a *State* in holding *derivative* instead of *independent* functions, but in being subject to such changes as Congress might adopt. But, until *revoked* or *annulled*, *an act of the Territory was just as obligatory as an act of Congress, and for the same reasons.*

Of course, your honor, the legislative power was, practically, a necessity, and this ordinance of 1787, which I have just read, provides expressly that such laws as were "not disapproved" should only be repealed by local authority.

Now let us read. Right here, your honor, he says, "Even at common law, under the old common law notions, the creation of such a government—a Territorial government—would at least be equal to the erection of a county palatine, and the transferring of the necessary sovereign prerogatives, and until revoked or annulled any act of the Territory of Utah is just as obligatory as an act of Congress."

Now, your honor, not only has this been the doctrine of this government judicially, by the Supreme Court of the United States since the first case of the American Insurance Company against Canter, down to this last case last winter, but it has been the theory of every department of the government, and never until this new-fangled theory sprang up in 1862, did anybody believe that Congress had any right to interfere with *local* affairs, *local* courts, or offences against the *local* laws of a Territory. Never. It is part and parcel of this drifting into federalism and consolidation, by which these members of Congress speak of us as their people, and us as the wards of such guardians.

Now, in illustration of this very point, I wish to call your attention to a speech made in 1850. It is not a legal authority, but it is one which my friend here will not gainsay. In 1850, when the Southern States undertook to force slavery on the North, California was admitted into the Union on the 9th of September; Utah was organized as a Territory on that day, and New Mexico on the same day, and they were all part and parcel of the great questions called the Compromise Measure, the omnibus bill. Then, for the first time, Congress undertook to intermeddle with local matters in the Territories. Jeff. Davis led the Southern hosts to defeat in the Senate then, as he did afterwards in the field. Daniel Webster, Henry Clay, Mr. Benton and all those illustrious men resisted it, and at that time the question was propounded as to the power of the Federal Government to interfere with local and domestic matters, and I now read a quotation from General Cass. Mr. Cass says:

> To us it appears that, from the earliest times, the policy has been to leave all matters of internal legislation to the Legislative Assembly, as soon as there was one, in a Territory of the United States. The only deviation to be found from this rule was when the agitation about slavery prompted attempts at exceptional provisions for or against it. It was at the very time that Utah was erected into a Territory that adverse pretensions on the subject of slavery in the Territories received a quietus, in the measures of 1850, advocated by Clay, Webster, Douglass, Cass and other eminent statesmen. They framed and advocated the several acts, among them the act organizing Utah, by which, without prescribing slavery or protecting slavery, the matter was left to the people of the Territory, like all other local subjects, and with the best results. Slavery never was introduced into either New Mexico or Utah, both organized on the same principle of leaving all domestic institutions to the local law. General Cass, in the debate on the subject, gave its true history. He said:
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> "During the pendency of the Territorial government they should be allowed to manage their own concerns in their own way. Does not slavery come within this category? Is it not a domestic concern? Is not that the doctrine of the South—of common sense indeed? No Territorial government was ever established which had not power to regulate the domestic relations of husband and wife, of parent and child, of guardian and ward; and if the inhabitants are competent to manage these great interests, and indeed the interests belonging to all the departments of society, including the issues of life and death, are they not competent to manage the relation of master and servant, involving the condition of slavery?"

I have shown that the Supreme Court of the United States, from the beginning to the end, as already quoted, from Chief Justice Chase, has ever and always resisted this power of Congress.

Now, I come to the next proposition. And admit that Congress has the power to prescribe and define the criminal jurisdiction for local offences [nobody denies that they have for offences against the United States, such as post-office robberies, counterfeit coining, &c.]; but admit that they have the power to define and prescribe criminal jurisdiction for crimes against the local laws, the organic law is not an act that Congress may repeal. It is a "CHARTER," as much so as the charter granted to Dartmouth College, which the Supreme Court declared could not be changed by the act of the legislature; and they who talk flippantly about the changing of laws by Congress do not understand the law. This is federalism—this is consolidation—this is despotism—and I repeat again that the intelligent men who live here are no more the slaves or wards of Congress now than they were when they lived in their old homes.

This organic law of Utah does not touch this question of *criminal jurisdiction at all;* you may call this froth, a political disquisition, or whatever you please, but, your honor, the organic law, the charter of Utah, does not pretend by word, sign, sentence or letter to confer *criminal jurisdiction* on any court in this Territory.

I contend, in the first place, that there was not any attempt by Congress in that section to define criminal jurisdiction.

In Section 9 of the "Organic Act," it is declared "that the judicial power of said Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and in Justices of the Peace;" and "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts, and of Justices of the Peace, shall be as limited by law; provided that Justices of the Peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and the said Supreme and District Courts, respectively, shall possess chancery as well as common law jurisdiction."

Now, the object of that was simply to create certain courts, and define what they should be. Then as to the jurisdiction, if it was to be limited by law, what law? There is no law in the world that defines the jurisdiction of a probate court. A probate judge is supposed to possess certain powers—to administer upon estates, grant guardianship and all that sort of thing; but there is nothing in the word "probate" that excludes him from administering law in other cases, provided the law confers *upon him the power to do it.*

Now, your honor, if the district court shall possess chancery as well as common law jurisdiction, is there anything there about *criminal jurisdiction?* Where does your honor find in that statute, where does your honor ever find, any act of Congress which authorizes district courts, of which your honor is one, to entertain jurisdiction in *criminal matters?* I repeat in *criminal matters.* In 1862, during the war, the powers of government naturally floated into the hands of the Executive and of Congress. Let me read to you several acts of Congress in which you will find that since 1862 Congress has conferred this very power that your honor, in your opinion, has asserted that you possess under section 9 of the organic act. In 1861 the government of Colorado was organized. I read now from the 12th volume of the Statutes at Large, page 175, and this brings me down to this identical 9th section. In the first place I will read you section 9 of the Organic Act of Utah, and then section 9 of the Organic Act of Colorado. In each of these organic acts the 9th section reads as follows: "And the said Supreme and District Court shall possess chancery and common law jurisdiction, *and authority for the redress of all wrongs committed against the laws of said Territory, affecting person or property.*"

I will read again, your honor, from page 242 of the same volume, in the case of Dakota Territory, from the same section—section 9. That too is exactly a copy of our statute.

Let me look once again, your

honor. The Territory of Arizona was organized in 1863. The statute organizing it was very short, and does not contain any provision as to jurisdiction either in civil, chancery or criminal cases. Let us come now to the very last Territory organized in this government, I mean Wyoming—the youngest one of them all, and on page 181 of the United States Statutes at Large, volume 15, the same provision is put in, designating that the district courts shall possess "chancery jurisdiction, as well as jurisdiction at common law, and also *criminal jurisdiction*." I repeat again, your honor, tell me if you can, why Congress, for six, seven, eight or ten years, has been conferring upon modern Territorial district judges *criminal jurisdiction* for offences against local laws if it was possessed by virtue of our Territorial organization. Jurisdiction in criminal cases, except for crimes under the acts of Congress, is not mentioned at all in our law, and the only thing in the world which Congress confers upon you district judges is that you may have authority to enforce the laws of the United States for crimes against the United States, and that the Territorial courts may enforce the laws against the United States, such as post office robbers, counterfeiters of coin, stealing timber from the public lands, bribery, buying and selling offices, &c. These are offences against the laws of the United States.

It may be said that section 9, which says that the district and circuit courts shall have jurisdiction in chancery and *common law*, confers common law jurisdiction upon you. To which I answer, there is no common law of the United States either in civil or in criminal cases. 1 Kent, page 367, American criminal law, 168

What is the common law? That which our ancestors brought from England to the Colonies. Does the common law exist in this Territory? If so, how came it here? Utah was transferred under the treaty of Guadaloupe Hidalgo, in 1848, from *Mexico*.

Article 9, Treaty Guadaloupe Hidalgo
Mexicans [and the Mormon people had become so under the Colonisatan Laws of that Republic by settlement here in 1847] who in the Territory aforesaid, shall not preserve the character of citizens of the Republic conformably to what is stipulated in the preceeding article shall be incorporated into the Union of the United States and be admitted at the proper time, [to be judged of by the Congress of the United States] to the enjoymedt of all the rights of citizens of the United States according to the principles of the Constitution, and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured *in the free exercise of their religion without restriction*. Under this treaty with with these provisions the Territory of Utah, now sold and transferred to the United States, and all the laws of Mexico, then existing here, remain to-day, except so far as they have not been changed by the acts of Congress or the Territorial Legislature here. Mexican law not Common law is here to-day.

The civil law remains attached to its soil, just as it did to California until by act of the legislature they adopted the common law in certain respects. The common law, such as right of dower, how did it come here? Who brought it? Where is your authority? The only law in the world that exists in Utah to-day is, first, the Constitution of the United States; second, the laws of the United States; and third, that statute book, which has been *adopted by the tacit assent of Congress*, as I will show you directly. The common law, forsooth! This very act prescribes that your honor shall pursue the form of common law as a matter of remedy, not as fixing rights. Does the right of dower exist here? If so, how came it here?

Now, your honor, admitting that section 9 of our organic act confers exclusive jurisdiction in common law and chancery cases, still there is no provision whatever as to *criminal jurisdiction*.

In Colorado, Dacota, Nevada and Wyoming Congress has conferred the power upon the Territorial District courts to exercise criminal jurisdiction, but it has *withheld it from you, sir*.

That criminal jurisdiction is conferred upon the Probate Courts of Utah, by an act *approved by Congress*, and that is as binding upon this court as if Congress had passed an act saying—"'Be it enacted, by the Senate and House of Representatives, that the act of the Legislature of Utah Territory, page 31 Territorial statues,' passed 15th

of January 1855, is approved and we do hereby affirm and ratify the same." My proposition is that the *tacit* consent of Congress is just exactly as binding as an act of Congress itself, and all the laws in the statute book of this Territory, much as they have been denounced, are laws of Congress as much so as if Congress had enacted that all the laws in the Utah statute book, passed from 1851 to 1871 "are hereby approved, affirmed and confirmed." And if there be the horrible things in that statute book which have been charged, Congress, your honor, is solely responsible for it.

Let us see who made these laws. "Be it enacted by the *Governor* and Legislative Assembly of the Territory." Who is the Governor? Where does he get his appointment? Who pays his salary? Who sends him out here? Congress. He is the agent of the government. He constitutes one half of the Legislative power. In addition to that he can veto any statute he pleases. And then what? If the legislature passes it, it goes immediately to Washington at the close of the session. And then what? If it is not disapproved, why then what? "All the laws passed by the Legislative Assembly shall be submitted to Congress for sanction, and if *disapproved shall be of no effect*," but if not disapproved, then what? Your honor, what does language mean? They are APPROVED.

Now let me read to you a decision which has never been cited in any of these cases. It is in 7 Wendell's reports, page 543, Williams against the Bank of Michigan. Let me tell you what this case was. It was a very important one. It was an action brought by the Bank of Michigan against John R. Williams, president of the bank. It became necessary to prove whether there had ever been a charter granted to the bank, and in addition to that, whether the Territorial legislature had *power to grant* a charter of incorporation. Your honor knows that the granting of a corporation was formerly regarded as one of the jewels of the crown; and all corporations in England, until very recently, were from the favor of the King, and in our country they were the result of the favor of the people. Mr. Williams gave a note and, like many other gentlemen, he did not pay it. They sued him, and the case was decided in 1831 in the court for the correction of errors in New York. The first question considered was, Had the Territorial legislature the power to exercise this sovereignty and grant an act of incorporation. Chancellor Walworth doubted that; he was an old-fashioned man. "But this charter had been granted fourteen years before, and Congress had never annulled it." I will show you directly how the right of eminent domain was exercised by that Territorial legislature, and how the right of escheat has been recognized in that State. Under the common law of England it belonged to the King. Here is Chancellor Walworth's dissenting opinion, as published in 7th Wendell's reports:

William vs. Bank of Michigan, Page 546.

"Chancellor Walworth says, notwithstanding these serious objections to the validity "of this act [of incorporation by the Territorial Legislature of Michigan of this "B nk] we cannot shut our eyes upon the "fact that it has been in operation within "the Territory of Michigan fourteen years "without having been *annulled or disapproved, or disapproved by Congress*, although "they [Congress] previously abrogated an "Act incorporating the Bank of Detroit at "a much earlier day.

"As a Territorial Government now about "to be established it is a fair inference that "Congress intended to confer necessary leg- "islative power on the Governor and "Judges, subject to the limitation and res- "triction that the laws to be adopted, should "be taken from the laws of the original "states, *and subject to the approval or disap- "proval of Congress*." With this qualification "it seems to the court that the [Territorial] "Legislature were clothed with *general "powers of legislation*, and the great variety "of laws of a general nature passed and "adopted, which are set out in the case, go "to fortify this construction. The [Territo- "rial] Legislative authority thus created by "Congress have decided that a bank is "necessary and suited to the circumstances of the district and if the power is *conceded* "the EXPEDIENCY of the measure is not "to be called in question by the JUDICIAL "TRIBUNALS of the country. In 1806 the "Governor and Judges incorporated the "Bank of Detroit and the next year Con- "gress *disapproved of it*, and passed a "law repealing *that* law of the Territory. "Congress has not in the present instance, "as in 1807, passed a law repealing the "*present* charter. The Bank of Michi- "gan has been in operation for several "years and has been permitted to go on "without interruption. This affords satis- "factory evidence that the government of

"the United States *does not* disapprove of "the charter, much less that it denies the "authority of the Governor and Judges, "[Territorial legislature] to pass such a "law."

This decision, given in 1831, is one with which no intelligent lawyer will disagree. It declares that a Territorial legislature did possess the power of self-government, and affords satisfactory evidence that the government of the United States did not *disapprove of the bank charter*, much less that it denied the power of the Territorial government which granted it.

Now, your honor, here is an act which has stood on the Statute Book of Utah since 1855. It has been in operation nearly twenty years; it has been permitted by Congress to go on without interruption. This affords satisfactory evidence that the government of the United States does not disapprove it. Why, your honor, in law as in love, in everything, *silence gives consent.* If a man offers his hand, and his purse, if he has one, to a woman, and she shuts her lips, what does she mean? Why, consent. These acts have all gone to Congress, and Congress has taken no notice of them, therefore Congress has affirmed them. Let me refer back, just one word, to Judge Campbell's decision in the Michigan reports, hitherto cited. He says—"But until revoked, &c." "Until "these statutes of Utah Territory "have been revoked by Congress "every one of them is just as obli- "gatory as the acts of Congress and "for the same reason." *Qui facit p r alium facit per se.*

Take these gentlemen on their own ground--Federal ground--and if Congress possesses the power to annul these acts and does not exercise it, why, in the name of all that is sacred and holy, do not they consent to it? I repeat again, and with a perfect conviction that this court will sustain me, that the statutes of Utah, about which so much has been said, are the statutes of Congress, made by the SILENT ASSENT of Congress, which is precisely as binding upon the whole people of the country as would be an affirmative declaration by them.

Now, your honor, let us see if the Supreme Court of the United States in the Engelbrecht case has decided this case. That decision says that every provision of that statute which has not been repealed by Congress is affirmed by Congress. That is the case with all the laws. I standupon the law. Listen to Judge Chase--a man now gone to heaven, where very few modern politicians are likely to go, according to my recollection of them. What does he say, your honor?

In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the Territory to transmit to that body copies of all laws on or before the first of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body.

"Their simple disapproval would "have disannulled it at any time; "if it is not disapproved it is a rea- "sonable inference that it was ap- "proved by that body."

But Congress leaves in our organic act all matters about crime or offences against the local laws to the local legislature, together with the mode of drawing juries. Now, therefore, your honor, I come to the conclusion that probate courts do have criminal jurisdiction over all crimes against the Territorial laws. First, by reason of the inherent power in the Territorial legislature to make their local laws, with the aid of the governor; and second,because of the tacit consent—the actual approval, by Congress, of the Territorial law of Jan. 9th, 1855.

I will read another decision to your honor, from Walker's Chancery Reports, page 88, given by Chancellor Farnsworth. This was a question as to whether the legislature of a Territory had power to grant a corporation for a railroad. The chancellor says, "The question was whether the local legislature had power to grant a corporation, because that was part of the sovereign power." He cites the law and shows they had and then says: "As Congress has never dis- "approved the act of incorporation "of the Detroit and Pontiac Rail- "road Company, it has thereby

"ratified and approved it." Therefore if it, Congress, has not "disapproved the act it has approved it."

In the case cited from 2nd Michigan, page 430, Gibbs Report, Swan against Williams, the question was whether the power of eminent domain existed in the Territory, and these judges, six in number, all of whom had served in the harness in the territory of Michigan, delivered the opinion cited.

SWAN *vs.* WILLIAMS.

We do not propose to enter upon an extended examination of the operation and objects of this ordinance, and of the powers conferred by it upon the Legislatures of the Territories, created under its provisions. It is and ever has been regarded as the Organic Law, or constitution of such Territories—declaring and guaranteeing the rights of the citizens—and providing for the formation and organization of Territorial governments, and delegating to such governments full powers of *local legislation*, after the acquisition of a sufficient population, to authorize the organization of legislative assemblies. It must not be understood that no restraints were, in our view, imposed upon the legislatures; but that such were rather in the nature of *constitutional* restraints, than of a reservation of power in general government perfectly consistent with every exercise of *sovereignty* compatible with republican institutions, and such as the people, in the erection of every State in this Union, have imposed upon legislative authority.

Among the powers incident to all governments, and necessary to their efficiency and preservation, are those of organizing towns and counties, constructing roads and bridges, and other highways, and assessing and collecting taxes; and it cannot be contended for a moment, that the silence of the ordinance in any of these particulars, would argue a want of power in the Territorial Legislature, to exercise them as public good or necessities might require.

Effective Territorial governments were as fully in view of the framers of the ordinance, as effective State governments which were to succeed them; and the restraints imposed upon the Territorial Legislatures, were upon their form and constitution, rather than upon their general powers and jurisdiction. The authority to make laws for the good government of the Territory, not repugnant to the principles and articles of the Ordinance, was expressly delegated. The term "good government," embraces within its scope the whole range of legislation necessary to secure the comfort, prosperity, and happiness of a people; and the authority could not be exercised, except as the usual attributes of sovereignty were lodged in the Territorial governments.

And lastly, because in Utah, not as in Colorado, Nevada, Dacota and Wyoming, our organic act contains *no provision whatever as to the criminal jurisdiction* over offences against the Territorial laws. Now, your honor, in conclusion I will say, this is a matter for the consideration of this court. Your honor has just come among us, and we all welcome you. Your honor is not bound by *stare decisis*. I ask your honor to look, in connection with the argument, at the peculiar conditions and influences, of which this is one link in a most extraordinary chain such as our country never saw before. For the last two years there has been no grand jury legally empanelled in the District Courts of this Territory. Crime is rampant on these streets—murders, robberies and larcenies. This man is charged with robbery outside the theatre—a highway robbery in these streets. He was arrested and has been tried. Not by the district court, because it saw fit to have no grand jury. He did not even plead to the jurisdiction of the court; he has gone in there with all his infamies on his head, has submitted himself to the jurisdiction of that court; was tried by a jury that he did not challenge; was tried upon evidence that convicted him, of one of the highest crimes known to our law; and now, your honor, look at this humiliating spectacle—a federal judge, receiving his appointment from the President of the United States, his compensation from the Treasury of the United States.

Your honor holds a responsible commission in Utah. I would not lessen it. If I had the power I would double and treble your salary tomorrow, and place you beyond the reach of temptation in this wicked country. This man is brought here on a writ of *habeas corpus*, with crime and infamy proven upon him. And a judge of the United States is asked to put him on the streets, that he may do just as one of his confederates did who was discharged by Judge Hawley—turn round and shoot one of our citizens. We have had no grand juries, and can not get one, and anarchy exists in consequence thereof.

Your honor, I have done. I feel deeply. I think I understand the law. I ask the Court to take no decision from any of its predeces-

sors. I aver that there is no record of the supreme court of this Territory to-day, if there is, let that young man who has charge of its record produce it, of any decision by that court. If you find one except the one which has gone to the Supreme Court of the United States, then I give up. There is a case now pending there in which this whole question is discussed. If you do not send this man back to his cell, I ask you as a citizen, and on my oath of office as a lawyer, to go into an investigation of his crimes, and instead of sending him back on these streets to-night to renew his work of infamy, hold him for the action of the next grand jury if you find he has committed any crime.

I close with this quotation from the Supreme Court of the United States—

As there is no provision relating to criminal jurisdiction of Territorial Courts in the Constitution, or the organic act, it can not be said that any legislation upon this subject is consistent with either. The method of procuring jurors for the trial of cases is therefore a rightful subject of legislation, and the whole matter of selecting, impanneling and summoning jurors is left to the Territorial legislature.